United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

74-1493

United States Court of Appeals

FOR THE SECOND CIRCUIT

In the Matter
of
R. HOE & CO., INC.,
Debtor.

In Proceedings for the Reorganization of a Corporation

ABARTA CORP. (d/b/a Press Publishing Co.),
Claimant-Appellant,
against
JAMES B. KILSHEIMER III and ROBERT M. CORRAO,
as Trustees,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF ON BEHALF OF APPELLEES

WINTHROP, STIMSON, PUTNAM
& ROBERTS
Attorneys for Appellees
James B. Kilsheimer III and
Robert M. Corrao, as Trustees
40 Wall Street
New York, New York 10005
WH-3-0700

A. EDWARD GRASHOF,
MARIE L. MCCANN,
Of Counsel.

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Issues Presented for Review

1. Whether a trustee in a Chapter X proceeding who neither asked for nor received permission from the Court to reject an executory contract with appellant, but on the contrary entered into a modification of that very contract, following lengthy negotiations with appellant, thereby breached that executory contract.

2. Whether appellant, having voluntarily entered into a modified executory contract with the Trustee in a Chapter X proceeding is entitled to an allowed unsecured claim or an administration claim on the basis that

(a) it did not intend to waive any right to recover damages for the breach of the original contract which had not been rejected by the trustee; or

(b) that the modified contract was entered into as a result of economic duress, despite the fact that it was the culmination of lengthy negotiations during the course of which appellant was represented by competent counsel and there was no wrongful act by the trustee which compelled appellant to enter into the modified contract against its will; or

(c) that an additional amount paid by appellant to the trustee as consideration for a printing press pursuant to the terms of the modified contract constituted an actual and necessary expense of preserving the estate of the debtor, resulting in an administration claim, despite the fact that the trustee performed his obligations under the contract and the administration claim which arose as a result of the modified contract was therefore satisfied.

Statement of the Case

Preliminary Statement

This brief is submitted in response to the brief of claimant-appellant Abarta Corp. (d/b/a Press Publishing Co.) (hereinafter referred to as "Abarta") which is appealing from an order of the United States District Court for the Southern District of New York entered on February 15, 1974 (A 159), disallowing and expunging the claim of Abarta in the instant reorganization proceedings. Abarta's claim was for $177,028, the amount which, in addition to the original contract price, Abarta had agreed to pay to the debtor after the commencement of Chapter X proceedings.

The trustee's objection to Abarta's proof of claim was based on the fact that "claimant agreed to renegotiate its contract with the Debtor and to pay a premium of One Hundred Seventy-Seven Thousand Twenty-Eight Dollars ($177,028.00) on the original contract price. Since claimant received full consideration for the sum advanced by it and the resultant novation of the original contract was specifically agreed to by claimant, claimant is not entitled to recover the claimed amount." (A 60-A 61)

Following a hearing held on the trustee's objection before Magistrate Raby, sitting as a special master, on December 30, 1971, the Magistrate allowed Abarta's claim in full as a general unsecured claim, stating, however, that:

> "If in fact the claimant had 'renegotiated' its contract, as above alleged in the objections, it seems quite clear that the objections to the claim would have to be sustained, either on the theory propounded by the

> trustee that parties have a right to renegotiate their contracts, or on the alternative theory that there was a 'novation' in which the trustee assumed the obligations of the debtor in consideration of a discharge by claimant of the obligations owed to it by the debtor." (A 68)

On March 27, 1972, the trustee moved in the District Court to reject in part the report of Magistrate Raby and to dismiss, among others, the claim of Abarta, on the ground that "said claimants received the press equipment purchased by them and that the additional payments they agreed to pay constituted a modification of their contracts with the debtor, or in the alternative, a novation which was satisfied * * *." (A 84). Thereafter, the parties submitted to the District Court a "Record re Trustee's Objection to Proof of Claim Filed by Abarta Corp. (d/b/a Press Publishing Co.)" (A 87-A 153), which included a "Stipulation of Historical Facts" entered into on May 2, 1973 (A 145-A 152) and a stipulation that neither party wished to present oral evidence on whether Abarta's claim should be expunged (A 153).

On January 10, 1974, the District Court rendered its opinion disallowing and expunging Abarta's claim, noting that:

> "Claimant was faced with a business decision: (1) either to pay no more and to assert an unsecured claim for the money it had paid on account to the Debtor; or (2) to agree with the Trustee to pay immediately the balance of the purchase price plus an additional negotiated amount to enable the Trustee to complete the press. PRESS PUBLISHING chose the latter alternative. It cannot now have the benefit of its choice to acquire its press and, at the same time, assert a claim for the

money it agreed to pay to enable the Trustee to manufacture it." (A 157)

Statement of Facts

On November 1, 1968, Abarta entered into a contract with the debtor for the manufacture of a six unit Colormatic press with a 3:2 folder and a 3-arm Reel, Automatic Tension and Full-Speed Splicing Mechanism for a total purchase price of $836,679 net, f.o.b. the debtor's plants (A 145). Thereafter, on June 20, 1969, an addition was made to the contract to include covering pin rollers at a cost of $175.00 (A 146). The contract provided for payment of 10% of the purchase price on acceptance of the agreement, 10% on commencement of engineering, 65% in monthly installments between the commencement of engineering and the estimated time of shipment, and the balance of 15% when the press was installed and ready for commercial operation (A 146). The press was scheduled for delivery on September 15, 1969 (A 147).

On July 7, 1969, the debtor filed a petition for reorganization under Chapter X of the Bankruptcy Act and the petition was approved on July 9, 1969 (A 147). At that time the debtor had an immediate need for several million dollars to enable it to continue in operation (A 147). On July 14, 1969, the Court signed an order directing the debtor's press customers

> " * * * to show cause why it was not in the best interests of the Debtor's Estate to direct the Debtor to devote its principal efforts to manufacture and deliver the presses of certain customers upon prepayment of the balance of their contract prices plus an additional payment, which in the case of those customers whose

presses were scheduled for delivery before September 8, 1969, amounted to 10% of the original contract price and which in the case of those customers whose presses were scheduled for delivery subsequent to September 8, 1969, an amount to be negotiated by such customers with the Trustee." (A 148)

On July 22, 1969, after hearings held on July 17 and July 22, the court signed an order with respect to press customers, including Abarta, which directed the trustee

> " * * * to commence negotiations * * * to determine the amount of prepayment and additional sum to be paid to the Trustee by each such press customer, said amount to be subject to approval of this Court, due regard being had for the rights and interests of all creditors of the Debtor * * * ." (A 29-A 30)

At the hearing on the order to show cause on July 17, 1969, the court stated that

> " * * * it would be my purpose and the trustee's purpose and the trustee's attorneys' purpose to sit down with you and present management to show you what we have and to enter into some kind of renegotiation with you which would supply the money to complete these machines * * * ." (A 97)

With respect to a question raised by counsel for one of the debtor's press customers whose press was scheduled for completion before September 8, 1969, as to whether the 10% additional amount over the purchase price proposed to be paid by those customers would be treated as an administration expense, the following ensued:

> "THE COURT: No, I say to you the 10 per cent would be regarded as an administration expense for

the protection of the purchaser and in the event you made this payment and you [sic] did not deliver it, the moneys that you paid over which would include the balance of the purchase price and your 10 per cent would be properly regarded by the Court as an administration expense.

"That is the form of security that I will give you.

"MR. HOLBEN: Until delivery?

"THE COURT: Until delivery. If delivery is made you would not get any refund whatsoever.

"MR. HOLBEN: If delivery is made did I understand the Court to say that it would treat the claims as a general unsecured claim?

"THE COURT: No, I said that even though you had made this payment of an extra 10 per cent, that would not be considered a waiver on the part of any purchaser of his right to claim this additional 10 per cent payment as an item of damages in the performance of the contract and file a claim in the event as he so selects as a general creditor for that amount." (A 111-A 112)

The fair purport of the court's remarks is that once a press was delivered any additional amount paid by a press customer would not be treated as either an administrative or a general unsecured claim, although such payment would not deprive the customer of its right to *file* a claim as a general creditor for that amount. This was emphasized again at A 122 when the court said:

"* * * they would still have a claim, whether or not it would be sustained or not, as an administration claim, they would still have a general claim, whether or not it would be sustained or not, a general claim as to additional amounts to be paid to get the machine over and above the contract price."

At least as early as August 1, 1969, the trustee's counsel and counsel for Abarta began negotiations looking to a modification of the debtor's contract with Abarta. These negotiations continued during August, September and October, 1969, and resulted in an agreement by Abarta to pay $423,493 to the trustee, which amount included the unpaid balance of the original purchase price and the amount which is the subject of the present controversy (A 150). This agreement was incorporated in an order of the court below which was entered on November 3, 1969. That order authorized the trustee to direct the debtor "to devote its principal efforts to the manufacture and delivery of the press ordered by Press with auxiliary equipment upon payment to the Trustee of $423,493 * * * ." (A 33) This sum was paid to the debtor on November 3, 1969 and delivery of the press commenced on November 26, 1969 and was substantially completed by January 15, 1970 (A 151).

ARGUMENT

POINT I

As a matter of law the trustee did not breach the debtor's contract with Abarta.

Appellees do not dispute the fact that the law of New York recognizes the doctrine of anticipatory breach of contract. Unfortunately, none of the cases cited by Abarta in support of this well settled proposition have any relevance to the issue at bar, since none of them are concerned in any way with a Chapter X or other bankruptcy proceeding. Nor do appellees dispute the fact that rejection of an executory contract gives rise to a claim in a Chapter X or other bankruptcy proceeding for breach of contract. But again, unfortunately, the cases cited by Abarta in support of this latter proposition are equally irrelevant to the issue at bar, for in all of those cases, the executory contracts in question were explicitly rejected.

Abarta's argument appears to be that certain acts of the trustee would amount to an anticipatory breach of contract under the law of New York and thus it is entitled to damages because it would have been so entitled under the Bankruptcy Act had the contract been expressly rejected. Abarta seeks to bolster this obvious non-sequitur by reference to certain acts and statements by the trustee and the district court which it asserts demonstrate that the contract was rejected (Appellant's Br., pp. 18-19). Abarta conveniently ignores, however, both the statements by counsel for the trustee and the district court that the contract was not rejected and the law which sustains those statements.

Counsel for the trustee flatly stated, at a hearing in November 29, 1969, "* * * that we have not with respect to any press customer disaffirmed or suggested or recommended the disaffirmance of any contract" (A 136). And the court itself, in an unreported opinion in these very proceedings (69-B-461, S.D.N.Y.) rendered on October 12, 1973 in connection with an application by McCall Corporation, another of the debtor's press customers, unequivocally stated at page 4 of the opinion, in discussing the order of July 22, 1969 (one of the items pointed to by Abarta as demonstrating rejection) that:

> "The action of the Court was not rejection of the original purchase contract. It was a plain statement of the financial and legal situation which confronted the Debtor at the time; it offered a possible solution of the difficulties which confronted the Debtor and the Trustee and the HOE press purchasers. Decision was left to the purchasers, after negotiations and bargaining, that resulted in a voluntary agreement which was carried out." (Opinion, Ryan, J., p. 4).

Section 116 of the Bankruptcy Act (11 U.S.C. § 516), specifically provides that:

> "Upon the approval of a petition, the judge may, in addition to the jurisdiction, powers, and duties hereinabove and elsewhere in this chapter conferred and imposed upon him and the court—
>
> "(1) permit the rejection of executory contracts of the debtor, except contracts in the public authority, upon notice to the parties to such contracts and to such other parties in interest as the judge may designate * * *."

Section 216(4) of the Bankruptcy Act (11 U.S.C. § 616(4)) provides that a plan of reorganization "may provide for the rejection of any executory contract except contracts in the public authority," and § 202 of the Bankruptcy Act (11 U.S.C. § 602) provides that "[i]n case an executory contract shall be rejected pursuant to the provisions of a plan or to the permission of the court given in a proceeding under this chapter, * * * any person injured by such rejection shall, for the purposes of this chapter and of the plan, its acceptance and confirmation, be deemed a creditor."

In *Texas Importing Company* v. *Banco Popular de Puerto Rico,* 360 F.2d 582 (5th Cir. 1966), the court, in construing these sections said, at page 584, that they "clearly indicate Congress intended that before an executory contract should be rejected, a judicial hearing and inquiry, at which interested parties might be heard, should be held * * *." See *King* v. *Baer,* 482 F.2d 552, 557 (10th Cir.), *cert. denied,* 94 S. Ct. 577 (1973).

Absent authorization by the court, a trustee in a Chapter X proceeding may not, of course, reject an executory contract, *Texas Importing Company* v. *Banco Popular de Puerto Rico, supra; In re American National Trust,* 426 F.2d 1059, 1064 (7th Cir. 1970); *In re Childs Co.,* 64 F. Supp. 282, 286 (S.D.N.Y. 1944), and unless the contract is rejected, the other party to the contract does not have a provable claim. *In re Greenpoint Metallic Bed Co.,* 113 F.2d 881, 884 (2d Cir. 1940); *U.S. Metal Products Co.* v. *United States,* 302 F. Supp. 1263, 1268 (E.D.N.Y. 1969).

The law is clear that rejection may not be inferred from the conduct of the parties but must be express. *In*

re Greenpoint Metallic Bed Co., supra, 113 F.2d at 884; *In re Childs Co., supra,* 64 F. Supp. at 286; *U.S. Metal Products Co.* v. *United States, supra,* 302 F. Supp. at 1268 (E.D.N.Y. 1969).

In *In re Childs Co., supra,* a matter involving executory leases, the petitioners-landlords contended "that the Trustee by his conduct and by reason of statements of his attorney is either estopped from affirming or is deemed to have disaffirmed the leases." (64 F. Supp. at 286). The contention was based on negotiations between the trustee and petitioners concerning the renewal or assumption of the leases by the trustee at a lower rental. The parties failed to come to an agreement, counsel for one of petitioners stated it might be necessary to move to reject or affirm the lease, and counsel for the trustee indicated that if such a motion were made, he would move to disaffirm. The court held that petitioners were not justified in concluding that the trustee had rejected the leases and made it clear, at page 286, that:

> "In the final analysis it is the Court who has the last say. It is the duty of the Court to say whether or not a lease should be rejected or assumed by the Trustee."

In *Texas Importing Company* v. *Banco Popular de Puerto Rico, supra,* the court, in discussing the assumption of executory contracts by the trustee, pointed out that:

> "If a trustee, without authorization by the court, can assume or adopt such a contract, or by conduct which would constitute an estoppel between private persons, could bar the court from exercising its statutory power to authorize the rejection of such a contract, then the power to determine that such a contract

should or should not be rejected would be lodged in the trustee. We think no such result was intended." (360 F.2d at 584).

This rationale applies equally to rejection of executory contracts.

It is clear from the foregoing that there are three essential prerequisites to a claim for breach of an executory contract in a Chapter X proceeding: (a) a hearing on notice to the parties; (b) permission of the court to reject; and (c) express rejection. None of these three elements are present in the case at bar. There has, therefore, as a matter of law, been no breach of contract by the trustee and Abarta is not entitled to the damages it seeks.

POINT II

Abarta is not entitled to recover the amount paid by it over and above the original contract price.

As indicated above, after negotiations extending over a three-month period (A 150) Abarta entered into a modification of the contract with the debtor whereby it agreed to pay $177,028 over and above the original contract price for the press. That agreement is evidenced by an order of the court below and Abarta expressly consented to the entry thereof (A 32-A 35). Pursuant to this modified contract, the debtor completed the manufacture and delivery of the press to Abarta (A 151), and Abarta received the benefits of this agreement. Abarta now seeks to nullify certain of its terms.

a) *The Substituted Contract Argument*

Whether the modified contract is deemed a novation or a substituted contract,* the fact remains that Abarta is bound by its terms and may not recover the additional amount which it agreed to and did pay, pursuant to that agreement.

To the extent that Abarta's argument and the authorities cited therefor (Appellant's Br., pp. 20-24) is predicated upon a breach of the contract, it is completely without merit, for, as has been demonstrated in Point I, *supra,* there was no breach, and could have been no breach, absent rejection of the contract pursuant to permission of the court—permission which was neither requested nor granted.

Abarta's argument with respect to consideration (Appellant's Br., pp. 24-25) is likewise irrelevant, for § 2-209 of the New York Uniform Commercial Code, subdivision (1) thereof, clearly and unequivocally states:

> "An agreement modifying a contract within this Article needs no consideration to be binding." *See Gateway Company, Inc.* v. *Charlotte Theatres, Inc.,* 297 F.2d 483, 486 (1st Cir. 1961).

Clearly, therefore, the modified agreement is valid and binding, whether or not there was consideration for the modification.

Abarta insists, however, in essence, that the modification of the contract did not effect a discharge of the obligations

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* "All novations are substituted contracts; and the converse is also true that all substituted contracts are novations * * *." 6 Corbin on Contracts § 1293, p. 189; *Ostrander* v. *Ostrander,* 199 App. Div. 437, 439 (3rd Dep't 1921).

of the original contract because Abarta did not intend to waive its rights under the original contract. In support of this contention, it points to statements made at hearings before the district court, all of which related to the filing of a proof of claim. There is, however, a vast difference between the preservation of a procedural right to assert a claim "whether or not it would be sustained" (A 122) in the reorganization proceedings, and the preservation of a substantive right to hold the debtor to the performance of the original contract despite the modification freely entered into, in writing, after months of negotiation and with the advice of competent counsel.

The original contract provided that:

> "This Agreement cannot be assigned nor may the terms and conditions be modified except by a duly approved Agreement signed by both parties." (A 51)

It was necessary, therefore, that the modification conform to the requirements of U.C.C. § 2-209(2) that

> "[a] signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded * * * ."

The terms of the modification are clearly and unambiguously set forth in the order of the district court entered on November 3, 1969 (A 32-A 34), upon the petition of the trustee (A 37-A 39), the entry of which was consented to by Abarta. Nowhere in that order is there any attempt to reserve the right to hold the debtor to the original contract, or preserve a right to damages for the breach of that contract (an ephemeral right in any event, since there was no such breach).

In *Hotchkiss* v. *National City Bank of New York,* 200 Fed. 287, 293 (S.D.N.Y. 1911) (Learned Hand, J.), *aff'd sub nom., Ernst* v. *Mechanics' & Metals Nat. Bank,* 201 Fed. 664 (2d Cir. 1912), *aff'd sub nom., National City Bank* v. *Hotchkiss,* 231 U.S. 50 (1913), the court said:

> "A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something else of the sort."

And in *Bakal* v. *Burroughs Corporation,* 74 Misc.2d 202, 205-206 (Sup. Ct. Schenectady Co. 1972), the court clearly stated the rule to be that

> " * * * no parol evidence of prior oral statements or representations may be considered as contradictory to the written terms of the final written agreement. Where parties without any fraud or mistake have deliberately put their engagements in writing, such writing is the only evidence of their agreement."

Abarta is attempting to convert its clear and unambiguous undertaking in writing to pay an additional amount over the original purchase price into an undertaking to pay this amount while retaining the right to recover it at some future time. This was not the intent of the parties as expressed in the agreement, and regardless of what statements were made by whom in the District Court, the terms of the agreement must prevail.

United States Navigation Co. v. *Black Diamond Lines, Inc.*, 124 F.2d 508 (2d Cir.), *cert. denied*, 315 U.S. 816 (1942), so heavily relied upon by Abarta, is not at all analogous to the case at bar for, as is clear from that portion of the opinion quoted by Abarta, in that case the written contracts were *pro tanto* "wholly consistent with the oral charters." 124 F.2d at 510. The court went on to say, at page 511:

> "The written charters were only agreements to carry out part of the appellee's obligations already entered into and so far as performed would have been in partial execution of the earlier contracts. *Those contracts were at least not wholly rescinded.*" (Emphasis added).

Abarta's reliance on this case is misplaced. More to the point is *International Contracting Co.* v. *Lamont*, 155 U.S. 303 (1894), which involved a petition for a writ of mandamus to compel the Secretary of War to sign a contract for certain work under a bid which had been accepted and which the defendant later decided was irregular and improper. The work was readvertised, plaintiff was again the low bidder but at a price one-third lower than the first bid and he was awarded the contract. The court held that there was no ground for issuing the writ, and in language peculiarly applicable to the instant case, said, at pages 309-310:

> "This contract had been entered into by him voluntarily. * * * In order to justify the issue of the writ, then, it would be necessary for us to hold that the second contract was void, and thereby to relieve the relator from obligations which he has assumed, and release him from the binding force of terms and stipulations to which he has subjected himself. * * *

> "But even if the writ of mandamus could be so perverted as to make it serve the purposes of an ordinary suit, the relator is in no position to avail himself of such relief. He entered of his own accord into the second contract and has acted under it and has taken advantages which resulted from his action under it, having received the compensation which was to be paid under its terms. Having done all this, he is estopped from denying the validity of the contract. * * * Nor does the fact that in making his second contract, the relator protested that he had rights under the first better his position. If he had any such rights and desired to maintain them, he should have abstained from putting himself in a position where he voluntarily took advantage of the second opportunity to secure the work. *A party cannot avoid the legal consequences of his acts by protesting at the time he does them that he does not intend to subject himself to such consequences.*" (Emphasis added).

See also *Stanspec Corporation* v. *Jelco, Incorporated,* 464 F.2d 1184, 1187 (10th Cir. 1972) ("The abandonment of rights under a contract by executing a later substituted contract is not prevented by protesting that rights still exist under the former.")

b) *The Economic Duress Argument*

Apparently uncertain of its position that the debtor continued to be bound under the original contract, Abarta next argues that in any event, it is entitled to recover the additional amount it paid under the modified contract because it was compelled to enter into the modified agreement as the result of economic duress. This assertion is completely without merit, for as a matter of law, Abarta was not subjected to economic duress. Indeed, it has failed

to demonstrate the presence of even one of the requisite elements of economic coercion rendering a contract voidable.

Its only reliance is upon *Austin Instrument* v. *Loral Corp.*, 29 N.Y. 2d 124, 130 (1971) in which the court stated that "[a] contract is voidable on the ground of duress when it is established that the party making the claim was forced to agree to it by means of a wrongful threat precluding the exercise of his free will."

1. *The trustee committed no wrongful act.* The *sine qua non* of economic coercion is wrongful conduct on the part of the defendant. *W. R. Grimshaw Company* v. *Nevil C. Withrow Co.*, 248 F.2d 896, 904 (8th Cir. 1957), *cert. denied*, 356 U.S. 912 (1958); *Austin Instrument* v. *Loral Corp.*, *supra*. Abarta relies upon an asserted threatened breach of contract as sufficiently wrongful conduct by the trustee to support its claim of duress. What Abarta completely overlooks, however, is, as has been demonstrated in Point I, *supra*, that the trustee had no power to breach the contract, for although the court may permit the rejection of an executory contract (11 U.S.C. § 516), this "requires judicial action by the judge and not merely administrative action and decision by the trustee." *In re American National Trust*, *supra*, 426 F.2d at 1064; *Texas Importing Company* v. *Banco Popular de Puerto Rico*, *supra*, 360 F.2d 584. Thus, any threat by the trustee to breach the contract, even if one were made (and the record disclosed no such threat), would be an empty one and could not possibly constitute the basis of a claim of duress.

With the permission of the court, of course, a rejection of the contract would be sanctioned by statute and hence

could not be wrongful conduct by the trustee. Certainly, therefore, a threat by the trustee to seek the permission of the court to reject the contract would not be wrongful, for "duress cannot be predicated upon a threat or the performance of an act which a person has a lawful right to perform." *Friedman* v. *Bache & Co.*, 321 F. Supp. 347, 350 (S.D. Fla. 1970), *aff'd*, 439 F.2d 349 (5th Cir. 1971); *First National Bank of Cincinnati* v. *Pepper*, 454 F.2d 626, 633 (2d Cir. 1972); *Oleet* v. *Pennsylvania Exch. Bank*, 285 App. Div. 411, 415 (1st Dep't 1955); *30 East End* v. *World Steel Products Corp.*, 110 N.Y.S. 2d 754, 757 (Sup. Ct. Bronx Co. 1952) (not officially reported).

2. *Abarta did not act under duress.* Even in the absence of special bankruptcy provisions, a mere threat to breach a contract is insufficient to constitute duress. *Halperin* v. *Wolosoff*, 282 App. Div. 876 (2d Dep't 1953); *Doyle* v. *Rector, etc., Trinity Church*, 133 N.Y. 372, 377 (1892); *30 East End* v. *World Steel Products Corp., supra*, 110 N.Y.S. 2d at 757; *Kohn* v. *Kenton Associates, Ltd.*, 27 App. Div. 2d 709 (1st Dep't 1967), *aff'd*, 23 N.Y.2d 726 (1968); *Colonie Construction Corporation* v. *De Lollo*, 25 App. Div. 2d 464, 465 (3d Dep't 1966), *aff'd*, 20 N.Y.2d 917 (1967); *Austin Instrument* v. *Loral Corp., supra*, 29 N.Y.2d at 130; *Steinberg Press* v. *Charles Henry Publications*, 68 N.Y.S. 2d 793, 795 (Sup. Ct. Kings Co. 1947) (not officially reported). The words of the court in *Boss* v. *Hutchinson*, 182 App. Div. 88, 90-91 (1st Dep't 1918), are particularly pertinent to the facts at bar:

> "The instant case is merely one where a seller refuses to deliver the goods at the agreed price, and demands a higher price. The purchaser has a com-

plete and adequate remedy at law. He can recover his damages for the breach of the contract:

* * * * *

"In this case he elected to pay the increased price. Having done so his payment was voluntary. There was no duress of person or of goods * * *. That he paid under protest does not make the payment involuntary.

* * * * *

" 'The act of payment was voluntary, and if he intended to litigate the right, he was bound at the time to take his position and resist the demand made upon him.' "

The rationale of all of the foregoing cases holding that a threatened breach of contract does not constitute duress is that plaintiff has an adequate remedy at law. Abarta seeks to avoid the impact of these cases by a strained attempt to demonstrate that its remedy at law was inadequate, although it concedes that it could have filed "a claim for breach of contract for non-delivery and return of the moneys already paid." (Appellant's Br., p. 35). The gist of its argument appears to be its need for the press in its business and the fact that it might not have recovered the full amount of its loss. But "a contract may not be avoided merely because the defendant was induced to enter it by reason of the pressure of business circumstances." *Weiner* v. *Tele King Corporation*, 123 N.Y.S.2d 101, 104 (Sup. Ct. Kings Co. 1953) (not officially reported). Nor is duress established by "proof that consent was secured by the pressure of financial necessity or circumstances of the person seeking to assert it." *Friedman* v. *Bache & Co., supra*, 321 F. Supp. at 350; see also *W. R. Grimshaw Company* v. *Nevil C. Withrow Co., supra*, 248 F.2d at 904.

There is no assertion that a press capable of printing Abarta's newspapers could not be obtained elsewhere, nor any evidence that delay in obtaining such a press would result in Abarta's inability to publish in the interim. Thus, the facts at bar differ materially from those in *Austin Instrument* v. *Loral Corp., supra,* where a delay in obtaining the necessary items would have resulted in a failure to meet delivery requirements under a contract with the Navy, which could cancel the contract in the event of default. Moreover, plaintiff would have been liable for substantial liquidated damages, and since it did a substantial amount of business with the Government, a failure to deliver might have jeopardized its chances for future contracts. Clearly, no such circumstances were present in the instant case. In short, like the stockholders in *First National Bank of Cincinnati* v. *Pepper, supra,* 454 F.2d at 634, Abarta was "represented by competent and knowledgeable counsel, who negotiated a compromise" with the trustee and it cannot now complain that its modified contract was entered into under duress. See also *U.S.* v. *Bethlehem Steel Corp.,* 315 U.S. 289, 301 (1941).

c) *The Administration Claim Argument*

Finally, Abarta asserts that it is entitled to recover the additional amount it paid over and above the purchase price as an administration claim on the theory that the payment constituted an actual and necessary expense of preserving the estate of the debtor. This is an argument without any merit whatsoever. Appellees do not dispute the proposition that debts incurred by a trustee during the course of operating the business of the debtor give rise to administration claims. The money paid by Abarta pur-

suant to the terms of the modified contract was paid as consideration for the press ordered by Abarta, and if the trustee had failed to deliver the press, Abarta would indeed have had an administration claim. The order itself provided that of the total payment of $423,493, which included the additional amount over the original contract price, $342,787 would constitute actual and necessary costs and expenses of preserving the estate of the debtor "until the time said press and equipment is ready for delivery with free and clear title" (A 33). The press having been delivered, however, the trustee's obligation under the contract was discharged and Abarta no longer had an administration claim against the estate of the debtor. It cannot now recover its additional payment on the theory that at one time it had such a claim which was cancelled by the performance of the trustee.

Summary

Abarta has completely failed to demonstrate that it is entitled to recover the additional amount paid to the trustee under any theory. The trustee did not breach the contract with Abarta. On the contrary, Abarta voluntarily entered into a modification of that agreement without duress of any kind, and having now concluded that it made a bad bargain, is seeking to escape its effects. It could have moved for an order rejecting or assuming its contract. It did not do so. It chose instead to renegotiate its terms. Having done so, it is bound by those terms. Regardless of what Abarta may have intended, those terms are clear and unambiguous, and Abarta is not entitled to recover any money paid thereunder.

CONCLUSION

The order of the District Court disallowing and expunging Abarta's claims should be in all respects affirmed.

Respectfully submitted,

WINTHROP, STIMSON, PUTNAM & ROBERTS
Attorneys for Appellees

By A. Edward Grashof
A. Edward Grashof
A Member of the firm
40 Wall Street
New York, New York 10005
Tel.: (212) 943-0700

A. EDWARD GRASHOF,
MARIE L. MCCANN,
Of Counsel.

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WACHTELL, LIPTON, ROSEN & KATZ
ATTORNEYS FOR Qbarta